



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 215

[Docket DARS-2015-0051]

RIN 0750-AI75

**Defense Federal Acquisition Regulation Supplement: Promoting
Voluntary Post-Award Disclosure of Defective Pricing (DFARS Case
2015-D030)**

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal
Acquisition Regulation Supplement (DFARS) to stipulate that DoD
contracting officers shall request a limited-scope audit, unless
a full-scope audit is appropriate for the circumstances, in the
interest of promoting voluntary contractor disclosure of
defective pricing identified by the contractor after contract
award.

DATES: Comments on the proposed rule should be submitted in
writing to the address shown below on or before **[Insert date 60
days after date of publication in the FEDERAL REGISTER]**, to be
considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2015-D030,

using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2015-D030" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2015-D030." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2015-D030" on your attached document.

- o E-mail: osd.dfars@mail.mil. Include DFARS Case 2015-D030 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, telephone 571-372-6176.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to stipulate that DoD contracting officers shall request a limited-scope audit when a contractor voluntarily discloses defective pricing after contract award, unless a full-scope audit is appropriate for the circumstances. In response to the Better Buying Power 2.0 initiative on "Eliminating Requirements Imposed on Industry where Costs Outweigh Benefits," contractors recommended several changes to 41 U.S.C. chapter 35, Truthful Cost or Pricing Data (formerly the Truth in Negotiations Act) and to the related DFARS guidance. Specifically, contractors recommended that DoD clarify policy guidance to reduce repeated submissions of certified cost or pricing data. Frequent submissions of such data are used as a defense against defective pricing claims by DoD after contract award, since data that are frequently updated are less likely to be considered outdated or inaccurate and, therefore, defective. Better Buying Power 3.0 called for a revision of regulatory guidance regarding the requirement for contracting officers to request an audit even if a contractor voluntarily discloses defective pricing after contract award.

II. Discussion and Analysis

This proposed rule amends DFARS 215.407-1(c) to—

- Require DoD contracting officers to request a limited-scope unless a full-scope audit is appropriate for the circumstances,

when contractors voluntarily disclose defective pricing after contract award;

- Indicate that to determine the appropriate scope of the audit, the contracting officer should consult with Defense Contract Audit Agency; and
- Clarify that voluntary disclosure of defective pricing does not waive Government entitlement to the recovery of any overpayment plus interest on the overpayments, or rights to pursue defective pricing claims.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The objective of the proposed rule is to stipulate that DoD contracting officers shall request a limited-scope audit when a contractor voluntarily discloses defective pricing after contract award, unless a full-scope audit is appropriate for the circumstances. This rule will apply to all DoD contractors, including small entities, who are required to submit certified cost or pricing data. If those small entities usually submit cost or pricing data frequently in order to avoid defective pricing claims, then this rule may encourage them to reduce the number of such submissions.

There is no change to reporting or recordkeeping as a result of this rule. The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the rule that would meet the requirements.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2015-D030), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 215

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 215 is proposed to be amended as follows:

PART 215—CONTRACTING BY NEGOTIATION

1. The authority citation for part 215 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Add sections 215.407 and 215.407-1 to subpart 215.4 to read as follows:

215.407 Special cost or pricing areas.

215.407-1 Defective certified cost or pricing data.

(c)(i) When contractors voluntarily disclose defective pricing after contract award, contracting officers shall request a limited-scope audit (e.g., limited to the affected cost elements of the defective pricing disclosure) unless a full-scope audit is appropriate for the circumstances (e.g., nature or dollar amount of the defective pricing disclosure). To determine the appropriate scope of the audit, the contracting officer should consult with Defense Contract Audit Agency (DCAA). At a minimum, the contracting officer shall request that DCAA evaluate—

(A) Completeness of the contractor's voluntary disclosure on the affected contract;

(B) Accuracy of the contractor's cost impact calculation for the affected contract; and

(C) Potential impact on existing contracts, task or deliver orders, or other proposals the contractor has submitted to the Government.

(ii) Voluntary disclosure of defective pricing is not a voluntary refund as defined in 242.7100 and does not waive the Government entitlement to the recovery of any overpayment plus interest on the overpayments in accordance with FAR 15.407-1(b)(7).

(iii) Voluntary disclosure of defective pricing does not waive the Government's rights to pursue defective pricing claims on the affected contract or any other Government contract.

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